DOCUMENT RESUME

ED 473 898 UD 035 508

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TITLE	Gay-Straight Alliances and Other Gay-Related Student Groups.
INSTITUTION	Gay, Lesbian, and Straight Education Network, New York, NY.
PUB DATE	2000-00-00
NOTE	11p.
AVAILABLE FROM	Gay Lesbian and Straight Education Network, 121 W. 27th St. #804, New York, NY 10001. Tel: 212-727-0135; Fax: 212-727-0254; Web site: http://www.glsen.org.
PUB TYPE	Reports - Descriptive (141)
EDRS PRICE	EDRS Price MF01/PC01 Plus Postage.
DESCRIPTORS	Federal Legislation; High School Students; *Homosexuality; Public Schools; Secondary Education; *Student Organizations; Student Rights
IDENTIFIERS	Access to Facilities; *Equal Access Act 1984; Gay Straight Alliances; *Homosexual Rights

ABSTRACT

This paper examines the legislative history of the federal Equal Access Act (EAA), which states that public secondary schools must recognize gay-related groups where the schools receive federal assistance and have a "limited open forum." If the EAA applies, a school must provide a gay-related student group with access to the school that is equal to the access provided to other student groups. The legislative history of the EAA arises principally from debates in Congress. The final debates in both the House and Senate largely presume one of two premises: either gay-related clubs will have the right to meet if the bill passes, or gay clubs already have the right to meet and the point of the bill is to equalize such groups with religious groups. This paper looks at the background of the EAA; Congressional discussion of gay student groups; the fact that the first amendment already gives gay groups the right to meet; and other relevant topics of discussion (maturity of high school students, fears about outside groups, schools' attempts to evade the EAA, and school claims of disruption by controversy). (SM)

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Gay-Straight Alliances and Other Gay - Related Student Groups

Contributed by David Buckel, Staff Attorney for Lambda Legal Defense and Education Fund

What did Congress Have to Say in Passing the Equal Access Act?

I. INTRODUCTION

Gay-related student groups, such as gay/straight student alliances, can play an important role in stopping anti-gay abuse of students in public schools. Under the federal Equal Access Act ('EAA'), public secondary schools must recognize gay-related groups where the schools receive federal assistance and have a "limited open forum." If the EAA applies, a school must provide a gay-related student group with access to the school that is equal to the access provided to other student groups.

This memorandum is about the legislative history of the EAA, and how the history may apply to gay-related student groups. If a school suggests it will deny students their right to meet as a group, the legislative history will be helpful to the students' efforts. For further information on how the courts have responded to efforts by students to trigger the protections of the Equal Access Act since it was passed, see our memorandum entitled 'THE EQUAL ACCESS ACT: WHAT DOES IT MEAN'? (the memorandum includes an appendix that sets forth the language of the Act).

The legislative history of the EAA arises principally from the debates in Congress. The final debates in both the House and the Senate largely presume one of two premises: either gay-related clubs will have the right to meet if the bill passes (a major basis for opposing the bill), or gay clubs already have the right to meet and the point of the bill is to equalize suchgroups and religious groups. Either way, gay-related clubs have the right to meet under the EAA, meaning that they are entitled to access to the school that is equal to the access provided to other student groups.

The debates also touched on other topics that may arise is discussions about gay-related groups, such as a school's fears about outside groups, a school's attempts to evade the EAA by saying one thing and doing another, and a school's recourse to claims of 'disturbances' to deny a group's right to meet. We will address these topics at the end of this memorandum.

II. BACKGROUND

On June 27, 1984, the Senate debated the final version of the Equal Access bill on the

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floor.[1] The Senate voted in favor of the bill, 88 to 11.[2] Subsequently, the bill arrived in the House, and on July 25, 1984, the House debated the bill.[3] The House voted in favor of the bill, as referred by the Senate, 337 to 77.[4]

Prior to enactment, the Equal Access bill had been in draft for three years.[5] In fact, on May 15, 1984, the House voted down one version.[6]

Subsequent to the bill's failure in the House, Senators Denton and Hatfield proposed a modified bill in the Senate as part of a larger bill addressing math and science in public schools.[7] During the debate on the floor, Senator Leahy joined with Senator Hatfield and proposed a "perfecting" amendment, which addressed many of the objections to the original Equal Access bill.[8]

One of the principal objections to the early versions of the bill was that it limited its reach to preventing schools from barring only religious groups. In supporting the final version that arrived in the House from the Senate, Rep. Eckart referred to the improvement in the bill with a useful rhetorical embellishment:

"By extending the equal access principle to meet the serious and well-taken objections of the opponents the first time around, we have extended to all voluntary student groups, political, philosophical, and other nonreligious groups in their orientation, the free-speech opportunity for young adults, people who we all hope to see mature and to become viable parts of our society. As much as the three "R's" are part of growing up in our society, so is the appreciation of divergent viewpoints in our society as well, and to raise the artificial bogeyman about what schools are capable or incapable of doing today by further excluding the free and open discussion of alternative views in our society hampers a real true diverse education.[9]

Rep. Frank, in explaining his shift from voting against the earlier Equal Access bill to his support of the final bill, stated: "the bill that we have before us now does not discriminate among different types of groups. . . . [i]t is a piece of legislation which says, if we are going to allow access to the schools for the young Republicans and the young Democrats, then all political opinions are going to be in and all social opinions are going to be in."[10]

The Senate co-sponsor, Senator Hatfield, stated:

The Senator from Alabama has spoken about religious activities as such and the circumscribing of those religious activities. I believe you can equally present this case as purely a matter of freedom of speech and freedom of assembly. . . . I am fully committed to the proposition that schools and education in general must be under the guidance and control of local school districts, local school boards . . . [b]ut where there is an action that is taken by such an official body, representing the public schools, which denies a right that is guaranteed under the Constitution, then the Congress of the United States, I think, has a duty and an obligation to step in and remedy that violated right. . . .There is a nexus between education and civil rights. Let us be vigilant though, whatever the subjects may be.[11]

He also stated: "Whether you are an atheist or whether you are a believer, I do not think that rights are bestowed on categories of people, they are bestowed on all people."[12]

The lofty language above is some of the best concerning the broad statutory purpose of fairness to all groups on matters of free speech, not just for religious groups.

During the final debate on the Senate floor, at the request of Senator Danforth, Senator Hatfield offered an additional amendment that became part of the Act under the heading of "Authority of schools with

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respect to order, discipline, well-being, and attendance concerns."[13] Senator Danforth's proposed amendment read as follows:

Nothing in this Act shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.[14]

This became known as the "Danforth Amendment."[15]

In introducing his amendment, Senator Danforth expressed concern about the consequences of assuring the right of students to gather for religious purposes. He based his concern on the "nature of religion," which is a "missionary effort."[16] He attributed the missionary effort not only to the mainstream religious groups, but also to "cults" such as the Hare Krishnas and the Moonies.[17] He believed that it would be "absolutely predictable" that if religious student groups meet in public schools, part of their activity would be to "proselytize."[18] Given his concerns, Senator Danforth described the purpose of his amendment as follows:

The theory of this amendment is to make it clear that the school administration does have, does continue to have inherent power to prevent the unrestrained, intensive, extreme psychological pressure which could be utilized by some religious groups to attempt to bring other kids within the religious community. Under this amendment, as it is presently drafted at least, it is the intent of the author of this language that it would continue to be possible for the school boards and the school administration to take such action as is necessary to prevent kids from being in effect brainwashed within the school premises; that is to say, in the event that, for example, a cult were to set up a cell, hold meetings, attempt to go out, draw other kids into this religious organization, and use what amounts to psychological warfare in order to accomplish that objective. I believe that it has to be within the power of the school to prevent that kind of activity to operate in the same manner as a parent would operate to prevent that kind of abuse of children on school property, and to operate in loco parentis. That is the purpose of the Danforth amendment.[19]

Senator Denton, co-author of the Equal Access bill along with Senator Hatfield, spoke immediately following Senator Danforth's declaration of the purpose of the Danforth Amendment. In his opening remarks, Denton endorsed the Danforth amendment, saying "I understand its intent and I have no problem with it."[20]

Given that the other sponsor of the bill, Senator Hatfield, had offered the Danforth Amendment in the first place[21], after discussions with Senator Danforth about his concerns,[22] it appears fairly clear that the basis for the provision was to allow schools to address the potential for brainwashing by religious cults outside the school.

III.GAY GROUPS

In the Senate, the other significant discussion of the Danforth Amendment occurred in a colloquy between Senator Hatfield, defending the bill, and Senator Gorton, opposing the bill. In that discussion, the two Senators also provided the most extensive references to gay-related student groups.

Senator Gorton interrogated Senator Hatfield on the non-curricular groups that he believed might flow into the schools under the bill if enacted, beginning with the "Posse Comitatus," a group characterized as believing that "government has no right to levy taxes."[23] In response, Senator Hatfield read the Danforth Amendment aloud for the proposition that the school can stop "disruption."[24] Further, Senator Hatfield stated that "I think this restates current law" and "I think the authority there is the same

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that now exists."[25] In the same vein, Senator Gorton then raised the Ku Klux Klan.[26] In response, Senator Hatfield said that the bill "in no way gives any outside group authority to go in . . . ." Gorton clarified that he was talking about students forming a Ku Klux Klan chapter, to which Hatfield responded by saying "I think it would be considered by the school administration as to whether the acts of that organization would be disruptive to the purpose of that school."[27]

Following the discussion of the Ku Klux Klan, the senators engaged in the most significant discussion about gay clubs in the debates, as follows:

> **Mr. Gorton.** One last specific question: What about gay rights activist school organizations?
>
> **Mr. Hatfield.** It is unlawful. Would the Senator repeat the question?
>
> **Mr. Gorton.** The promotion of gay rights is unlawful?
>
> **Mr. Hatfield.** It is not the question of promotion.
>
> [I must admit to puzzlement on the part of this Senator. Does the Senator from Oregon mean to say this amendment would not offer a gay rights activist organization the protections of a limited open forum?]
>
> **Mr. Hatfield.** Let me put it this way . . . . As the Senator from Washington knows, some States have laws that prohibit actions of homosexuals. You cannot bring in an outside organization that is advocating or establishing some kind of purpose to violate laws of those States.
>
> **Mr. Gorton.** But in States which have abolished any laws about sexual activity between consenting adults . . . that defense would not obtain?
>
> **Mr. Hatfield.** I would presume, if they want to talk about political rights on sexual choice or sexual preference that political right would be one thing, but to carry on an activity that is clearly in violation of law would, of course, be out of bounds.
>
> **Mr. Gorton.** I gather the summary of what the Senator has said is that the creation of a limited, open forum does not require that student organizations be permitted for any speech purpose whatsoever; that at least with the perfecting amendment of Senator Danforth, if the school finds that the prohibition of an organization is necessary or advisable to maintain order and discipline on school premises, they can prohibit the formation of a student organization in spite of the limited open forum, even though that student organization is only going to engage in talk and not in any form of action or physical disruption whatsoever.
>
> **Mr. Hatfield.** The answer to the Senator's question is "yes," but I come back to the

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basic purpose and the reason we have this whole matter coming up in the Senate is for none of those issues but, rather, the simple proposition that schools today are increasingly limiting in the area of free speech. I underscore again that I believe historically the Government's role is to protect. As a nonlawyer, I interpret the Government's role in relation to religion is to be neutral, to be neither an advocate nor to be hostile, I submit that the actions of the courts of recent time have put the Federal Government and the State governments into a hostile role, not a neutral role. It has moved it out of the neutrality which I think Government should, maintain. It has really established a hostile role for Government because it has specifically said your rights go up to but do not include discussion of religious subjects.

Mr. Gorton. I completely agree with the statement of the Senator from Oregon. I regret to say, therefore, that I do not believe the courts are likely to interpret this bill in the way the Senator has described it in answer to these last fewquestions. I am convinced that the limited open forum which the Senator has described clearly covers the Ku Klux Klan - as long as it agrees not to engage in any violent activity - clearly allows an organization, discussions of which involve promoting the idea of racial superiority of one group or another; clearly beyond the slightest peradventure of argument protects a gay rights organization in a school.[28]

The emphasized language demonstrates agreement between the senators that the bill protects gay-related groups whose mission is otherwise lawful (that is, no criminal acts) and not "disruptive," although Gorton seemingly ties his agreement to likely judicial interpretation that will seek to avoid conflict with First Amendment jurisprudence.[29] In terms of legislative intent, the agreement is significant because it occurs between the principal sponsor\defender of the Equal Access bill in the Senate, and one of the two principal opponents of the bill.[30]

The topic of gay clubs also arose in the opposition to the bill presented by Senator Metzenbaum. Senator Metzenbaum, who was primarily concerned about religious cults and some vagueness in the statute, observed the following:

So if a group wanted to use the facilities for a peaceful meeting, I read this language to say that the school board would have absolutely no authority to deny them that right, and if some group advocating gay rights wanted to use the school, it would appear very clear that there would be no right to deny them those facilities. I am not even certain that you can make a distinction between those States that make homosexual activities illegal and those that make homosexual activities legal, because, we have recognized that people can speak out with respect to various issues whether or not they are actually involved in committing acts that are prohibited. I will not address myself to whether it would or would not be permissible in those States that bar homosexual activities to permit gay rights groups to meet, because I do not think that is the issue. I think the issue is this: Can a school board stop some groups from using

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their facilities? Unless an organization is there to be disruptive or to breakthe law, I read the language of this proposal as saying that they cannot.[31]

At bottom, these remarks represent one side to the discussion of gay clubs, and indicate that the bill should be seen as protecting gay clubs' right to meet as long as they are not controlled by outside groups and are not disruptive or unlawful. The next section presents the other side to the discussion, which holds that gay clubs already have the right to meet independent of the bill, and the bill merely acknowledges that right.

IV.THE FIRST AMENDMENT ALREADY GIVES GAY GROUPS THE RIGHT TO MEET

Senator Denton, co-author of the Equal Access bill along with Senator Hatfield, also touched upon gay-related groups. Senator Denton believed that it was unnecessary to add "political, philosophical, and other speech" to the Equal Access bill, because those forms of speech already had protection that religious speech did not. As an example, he cited the speech of gay rights students' groups:

For example, in Gay Rights against Bonner, a Federal court upheld the right of a gay rights student group to meet at the high school level. That problem existed before. It will not exist any more seriously as a result of this bill being introduced. I think, perhaps, if there is something wrong with homosexuality, this Senator believes it to be an unfortunate anomaly, which thoughts about God and order might help to alleviate the tendency toward in the first place, or the tendency to remain in it. But there is nothing new that the school board will have to contend with in the sense of the modification of the Senator from Missouri. They have to contend with that now, and they have been letting them in, generally.[32]

Nonetheless, Denton agreed to add "political, philosophical, and other speech" to the Equal Access bill in order to ensure its passage.[33]

Denton's point that the bill introduces nothing new for groups other than religious groups, because other groups alreadyhave access, is a point that reverberates throughout the legislative history. Senator Mitchell stated as follows:

The concerns raised about the wide range of student activities that might have to be tolerated under this amendment ignore the fact that school boards and administrators today are already being required to consider such requests under the first amendment. Numerous nontraditional groups are asserting their rights to meet on the same basis as other groups. Those assertions of rights are being brought under the first amendment, a far more compelling and authoritative enactment than this legislation. And in the large majority of cases, the courts are, in fact, vindicating the rights so asserted.[34]

Denton's point found its way to the House, too. In support of the bill, Rep. Perkins stated:

. . . court decisions have said that all sorts of student groups are entitled to use public school premises for the free speech-discussion of opposition to the war in Vietnam, of support for gay rights, and of support for Communists and the Ku Klux Klan activities. All this legislation does is to say that students wishing to discuss religious belief among themselves are given the same right.[35]

In the House, Rep. Edwards opposed the bill in part on the authority of a New York Times editorial attacking the bill because it would allow undesirable student groups to form, including gay groups. Edwards entered the editorial into the Record, and in pertinent part it read as follows:

Bending itself out of shape to accommodate the pressure for prayer in schools, the Senate

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has now acted to admit a little prayer before or after classes, but in a perversely liberal way; it would also admit some atheism, politics, and perhaps even homosexual agitation on an equal basis. . . . They may think they're putting God in the classroom, but atheists, too, would have their hour. So would socialists, homosexuals and vegetarians.[36]

However, Rep. Coats responded in support of the bill by saying:

Members were handed a handout as they entered the floor quoting the New York Times editorial against this bill. It says the proponents of this say they are putting God in the classroom, but atheists too, would have their hour. So would socialists, homosexuals, and vegetarians. That is the issue. Socialists, homosexuals, and vegetarians already have their hour under the court interpretation. We are simply trying to add the right of students after hours to meet for religious purposes as these others have the right.[37]

In the course of the debates in the Senate and the House, two strains of thought emerged about gay clubs. The first strain of thought is represented by Senators Hatfield and Groton and Rep. Edwards, and it holds that if the bill passes then gay clubs will acquire the right to meet, for good or bad – and of course the bill passed. The other strain of thought is represented by Senators Denton and Mitchell, and Reps. Perkins and Coats, and it holds that the First Amendment already gives gay groups the right to meet and all the bill is seeking to accomplish is to legislatively equalize that status with religious groups, by incorporating the Supreme Court's First Amendment protection for college students in the Widmar case and applying it to high school students. Under either interpretation, gay groups have the right to meet.

V.OTHER RELEVANT TOPICS

1.THE MATURITY OF HIGH SCHOOL STUDENTS

In discussions about gay-related student groups, some may raise the topic of whether students have the maturity to understand that the school does not 'endorse' a gay-related group. The same topic arose in the Congressional debates with regard to whether students have the maturity to understand that the school does not 'endorse' a religious group. In response, Senator Hatfield stated: "Our high school students are sufficiently sophisticated to understand that equal access to an open forum does not imply the Government's support of or encouragement for religion."[38]

Senator Durenberger stated: ". . . as many experts acknowledge and the young students who testified showed, students below the college age can understand that an equal access policy is one of State neutrality toward religion. . . . [n]ot of State favoritism or sponsorship."[39]

Rep. Roukema stated:

Some have claimed that allowing religious groups to meet in the school under any circumstances will have the effect of advancing religion because of the impressionability of high school students. This assumption ignores studies of adolescent psychology which have shown that it is a time of increased cognitive capacity, marked by an ability of the adolescent to differentiate himself from authority figures he depended upon as a younger child. Adolescence, almost by definition, is a crucial stage of development where it is important that one be exposed to different viewpoints and become aware of the variety of ideas which characterize our society.[40]

2.ON FEARS ABOUT OUTSIDE GROUPS

Typical arguments concerning infiltration of schools and recruitment of children also arose in the Congressional debates, with

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religious groups as the target of the day instead of gay groups. Supporters of the bill responded with remarks that could carry over to gay groups. Senator Thurmond stated as follows: It was also predicted that public school campuses would be turned into "battlegrounds for souls." Frankly, Mr. President, such suggestions are, in my opinion, patently absurd. It is a well-known fact that nonstudents are allowed to enter the premises of public schools only with the permission of school authorities.[41]

While Rep. Kastenmeier opposed the bill based on fears of outside groups such as the KKK and Nazis, at the same time he stated that the bill had improved "by curing many of the problems of the earlier bill, including unlimited access by outsiders . . . ."[42]

Rep. Slattery stated:

The earlier version of the Equal Access Act also did not make clear whether student groups would be allowed to bring in outside religious leaders and clergy to participate in and to lead the student religious meetings. The amendment before us addresses this problem by stating, "nonschool persons may not direct, conduct, control or regularly attend activities of student groups."[43]

3.ON A SCHOOL'S ATTEMPT TO EVADE THE EQUAL ACCESS ACT

Many legislators rightly anticipated that schools would attempt to evade the Equal Access Act. Their remarks will be helpful in situations where schools engage in such attempts. Senator Leahy stated:

Whatever the official decision of the school, the language of the earlier draft might have been interpreted to allow the school's actions to differ from their words. Take the case of a school that decided not to have a limited open forum, having adopted a formal resolution to that effect. Suppose that school then decided to consider any student group wanting to meet on school premises during noninstructional time on a case-by-case basis. Counsel to that school board might well argue that the board's resolution took the school outside the coverage ofthis bill, since the bill only applies to schools that have a limited open forum, and the resolution states that the school does not have a limited open forum. since the bill would not apply to this school, the school could then turn around and allow only non-religious clubs or perhaps allow only religious clubs on school premises during noninstructional hours. The point is that a limited open forum should be triggered by what a school does, not by what it says.[44]

Similarly, Senator Dole stated:

Perhaps the most important improvement made by this perfecting amendment is to clarify the meaning of a 'limited open forum.' This change will preclude a school from practicing one policy toward the use of school facilities by student groups, while officially adopting another. Both religious and secular groups will benefit from this clarity.[45]

4.ON A SCHOOL'S CLAIM OF DISRUPTION BY CONTROVERSY: THE HECKLER'S VETO

Some schools may attempt to deny a gay-related group's right to meet on the grounds that its meetings will cause others to create disturbances. Such reasoning would allow 'hecklers' to essentially 'veto' the right to free speech of others, taking the meaning out of the concept of free speech. On the topic of the "heckler's veto," Senator Denton provided helpful comments, which are particularly significant given that he was a co-sponsor of the Equal Access Act. To support his point that all other groups already have the First Amendment protection they need to meet in schools, and that therefore the Equal Access bill does not create any threat of extending protections to new groups other than religious groups, Denton quotes an ACLU publication:

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Can students be prohibited from expressing their views if those who hold opposing views become angry and boisterous? No . . . Can school officials keep students from forming an after-school club having a dissident point of view? No . . . Can the school prevent students from inviting a speaker to their club meeting because he or she is too controversial? No . . .[46]

In addition, following enactment of the Equal Access Act, the two sponsors in the House, Reps. Bonker and Goodling, published "Equal Access Guidelines" in the Congressional Record. Cong. Rec. 32315-18 (October 11,1984). In pertinent part, the guidelines are as follows:

(20) Q. Do school authorities retain disciplinary control?

A. Yes. The Act emphasizes the "authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." Sec. 802(f). Furthermore, the school must provide that "the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school." Sec.802(c)(4). These two provisions do not authorize a school to prohibit certain student groups from meeting because of administrative inconvenience or speculative harm. For example, a group cannot be barred at a particular school because a similar group at a different school has generated difficulties.

(21) Q. What about groups which wish to advocate or discuss changes in existing law?

A. Students who wish to discuss controversial social and legal issues such as the rights of the unborn, drinking age, the draft and alternative lifestyles may not be barred on the basis of the content of their speech. However, the school must not sanction meetings in which unlawful conduct occurs. Sec.802(d)(5).

(22) Q. What if some students object to other students meeting? A. The rights of the lawful, orderly student group to meet are not dependent upon the fact that other students may object to the ideas expressed. All students enjoy free speech constitutional guarantees. It is the school's responsibility to maintain discipline in order that all student groups be afforded an equal opportunity to meet peacefully without harassment. The school must not allow a "hecklers' veto."

(23) Q. What about so-called "hate" groups? A. Student groups which are unlawful, Sec.802(d)(5), or which materially and substantially interfere with the orderly conduct of educational activities, Sec.802(c)(4), can be excluded. However, a student group cannot be denied equal access because its ideas are unpopular. Freedom of speech includes ideas the majority may find repugnant.[47]

Endnotes

1 130 Cong. Rec. 19211-52 (1984).

2 Id. at 19252.

3 Id. at 20932-51.

4 Id. at 20951.

5 Id. at 19225 (comments of Senator Hatfield).

6 Id. at 20938 (comments of Senator Kastenmeier).

7 Their proposal was Amendment No. 3152. Id. at 19211.

8 The perfecting amendment was No. 3340. Id. at 19219.

9 Id. at 20944.

10 Id. at 20933.

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11 Id. at 19217.

12 Id. at 19220.

13 Id. at 19222.

14 Id. at 19222.

15 Id. at 19228.

16 Id. at 19228.

17 Id. at 19228.

18 Id. at 19228.

19 Id. at 19229.

20 Id. at 19229.

21 Id. at 19222

22 Id. at 19228

23 Id. at 19224.

24 Id. at 19224.

25 Id. at 19224. 26 Id. at 19224.

27 Id. at 19224.

28 Id. at 19224 (emphasis added).

29 The consideration of anticipated judicial interpretation is logical in view of the Congressional intent to assure legislatively that all school groups have the same First Amendment rights.

30 Senator Metzenbaum was the other principal opponent. Id. at 19225-19227, 19231-19235).

31 Id. at 19226.

32 Id. at 19230.

33 Id. at 19230.

34 Id. at 19244.

35 Id. at 20948.

36 Id. at 20937-20938, quoting Editorial, Schoolhouse Free-For-All, N.Y. Times, July 25, 1984.

37 Id. at 20940.

38 Id. at 19218.

39 Id. at 19239.

40 Id. at 20936.

41 Id. at 19245.

42 Id. at 20938.

43 Id. at 20947. See also Id. at 20948 (remarks by Rep. Hall.); Id. at 20949 (remarks by Rep. Schneider); Id. at 20938 (remarks by Rep. Ratchford); Id. at 20940 (remarks by Rep. Williams.

44 Id. at 19221-19222.

45 Id. at 19243.

46 Id. at 19230.

47 Id. at 32317.

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